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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. PETRONILO ALVARADO, JR., Petitioner.	2 CA-CR 2010-0354-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20003859

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Petronilo Alvarado, Jr.
Douglas
In Propria Persona

B R A M M E R, Presiding Judge.

¶1 Petronilo Alvarado, Jr. petitions this court for review of the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R.

Crim. P. We will not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In December of 1999, Alvarado caused a five-vehicle accident when he, driving with a blood alcohol concentration (BAC) of .149 and weaving in and out of traffic, failed to avoid a stalled vehicle. After a jury trial held in his absence, Alvarado was convicted of aggravated assault, aggravated driving with a BAC of .10 or more, driving under the influence of an intoxicating liquor, and multiple counts of criminal damage and endangerment. The trial court sentenced him to concurrent, presumptive prison terms, the longest of which was 7.5 years. Alvarado appealed; his counsel filed a brief pursuant to *Anders v. California*, 386 U.S 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999); and Alvarado filed a supplemental brief. We affirmed his convictions and sentences. *State v. Alvarado*, No. 2 CA-CR 2006-0409 (memorandum decision filed May 9, 2008).

¶3 Alvarado then filed a notice of post-conviction relief, and appointed counsel filed a notice pursuant to Rule 32.4(c)(2), stating he had found "no colorable legal issue to raise pursuant to Rule 32." Counsel further stated, however, that he had identified "an arguable issue" regarding the trial court's imposition of a criminal restitution order, asserting that, based on our decision in *State v. Lewandowski*, 220 Ariz. 531, 207 P.3d 784 (App. 2009), he "believe[d] that under Rule 32.1(c), th[e trial] court

should vacate" the criminal restitution order. The trial court vacated the restitution order and granted Alvarado leave to file a pro se petition for post-conviction relief.[1]

¶4 Alvarado did so, raising seven claims: (1) that his trial counsel had been ineffective in failing to object to the trial court's responses to jury questions, failing to object to witness testimony that contradicted a police report, and failing to object to the sentence imposed based on *Blakely v. Washington*, 542 U.S. 296 (2004); (2) that appellate counsel had been ineffective in failing to provide Alvarado copies of the trial transcripts after filing a brief pursuant to *Anders* and in failing to raise arguments challenging the criminal restitution order or the court's minute entry classifying several of Alvarado's convictions as felonies instead of misdemeanors; (3) that the court had failed "to properly answer jur[or] questions"; (4) that the evidence was insufficient to support his convictions; (5) that the court erred by denying his motion in limine to preclude evidence that one of the victims was pregnant at the time of Alvarado's offenses; (6) that his Fifth Amendment rights were violated when a juror who commented on his absence from trial during voir dire was not stricken and when the court commented on Alvarado's absence; and (7) that his statement to a police officer that he had been drinking before the accident was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

[1]The trial court also granted Alvarado's motion to correct a clerical error in the sentencing minute entry and clarified that several of Alvarado's criminal damage and endangerment convictions were misdemeanor offenses.

¶5 The trial court found the bulk of Alvarado's claims precluded because they either had been addressed or were raisable on direct appeal. *See* Ariz. R. Crim. P. 32.2(a). It addressed and summarily rejected his claims of ineffective assistance of trial and appellate counsel, concluding Alvarado had not demonstrated he had been prejudiced. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) ("To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.")

¶6 On review, Alvarado asserts the trial court erred in finding precluded his claim based on *Miranda*, correctly noting that he, at least arguably, had couched this claim in terms of ineffective assistance of trial counsel. But we nonetheless conclude the court did not err in rejecting this claim. The only statement Alvarado identifies as involuntary was his admission to a police officer that he had drunk "a couple shots of peppermint schnapps" before driving. Even had that evidence not been admitted, however, other evidence still demonstrated Alvarado's BAC within two hours of the accident in question was .149. Thus, any error in the admission of his statement was plainly harmless, and Alvarado therefore has not demonstrated he was prejudiced by his counsel's failure to raise a *Miranda* claim, even assuming there was a valid basis for him to do so. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004) ("Error is harmless if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict."). To the extent Alvarado asserts his trial counsel was ineffective in failing to conduct an adequate

investigation of his case or in failing to present mitigating evidence at sentencing, he did not raise these claims to the trial court and we do not address them. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

¶7 For the first time on review, Alvarado asserts he is entitled to raise his claim that the trial court made improper comment on his absence from trial, arguing he was unable to raise this claim on appeal due to appellate counsel's failure to provide him the transcript containing the court's remark.[2] In a related argument, he also asserts the court erred in rejecting his claim of ineffective assistance of appellate counsel, reiterating that appellate counsel failed to provide him with trial transcripts.[3] Assuming, without deciding, that the court erred in rejecting this claim on the stated basis that the "failure to provide trial transcripts to a defendant does not fall into the category of ineffective assistance," we agree with the court that Alvarado also has failed to demonstrate he was prejudiced.

¶8 That the trial court improperly commented on his absence is the only claim Alvarado identifies as one he was unable to raise due to counsel's purported failure to

[2]On review, Alvarado apparently abandons his similar claim based on a juror's purportedly improper comment on his absence at trial.

[3]Alvarado also asserts the trial court erred in rejecting his ineffective assistance of appellate counsel claim because counsel failed to raise on appeal issues related to the imposition of a criminal restitution order and the classification of his offenses. But, the trial court resolved these issues.

provide him trial transcripts during the pendency of his appeal. That claim is wholly without merit. The court's statement that Alvarado had not "grac[ed] us with his appearance in this trial" was made out of the jury's presence and therefore could not have adversely affected Alvarado. Moreover, as we have noted, Alvarado did not argue in the proceedings below that this claim should not be precluded. *See* Ariz. R. Crim. P. 32.2(b). We need not address issues raised for the first time on review and, accordingly, do not further address this argument. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928; Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶9 For the reasons stated, although we grant review, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge